Supreme Court, U.S.
FILED
AUG 9 2001
CLERK

No. 00-853

In The
Supreme Court Of The United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition For Certiorari Filed: November 22, 2000
Certiorari Granted: June 4, 2001

79 pp

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APPENDIX TABLE OF CONTENTS

Relevant Docket Entries: U.S. District Court JA-1

Relevant Docket Entries: Second Circuit Court of Appeals. JA-3

Administrative Directive 9.6 Inmate Grievances. JA-5

Statutory Provisions

42 U.S.C. § 1997e JA-19

18 U.S.C. § 3626 . . . . . JA-23

28 U.S.C. §636 . . . . . JA-31

Complaint (CV No. 3:99CV01091 (AHN)) JA-38

Motion to Dismiss (CV No. 3:99CV01091 (AHN)) JA-41

Opinion of the District Court (CV No. 3:99CV01091 (AHN)) JA-43

District Court Judgment (CV No. 3:99CV01091 (AHN)). JA-52

Plaintiff's Notice of Appeal (No. 99-0387) JA-53

Opinion of the Circuit Court of Appeals (No. 99-0387) JA-54

Mandate of the Circuit Court of Appeals (No. 99-0387) JA-75

Letter of June 4, 2001 from William K. Suter, Clerk of the Supreme Court of the United States, to Richard Blumenthal regarding granting of certiorari JA-77

RELEVANT DOCKET ENTRIES:

U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT
CV No. 3:99CV01091 (AHN)

6/10/99	COMPLAINT
6/10/99	APPEARANCE of Attorney for Ronald Nussle -- Norman A. Pattis
6/10/99	SUMMONS (ES) issued for Willette, Porter
6/28/99	SUMMONS Returned Executed on 6/16/99 as to Porter, individually
7/14/99	APPEARANCE of Attorney for Porter -- Robert Bishop Fiske III
8/23/99	MOTION by Porter to Dismiss
8/23/99	MEMORANDUM by Porter in support of Motion to Dismiss
8/24/99	APPEARANCE of Attorney for C.O. Willette in his official capacity only -- Robert Bishop Fiske III
9/8/99	MEMORANDUM by Ronald Nussle in opposition to Motion to Dismiss by Porter
9/15/99	MOTION by Ronald Nussle for Entry of Default as to Willette
9/16/00	REPLY by Porter to response to Motion to Dismiss by Porter

11/9/99	Motion hearing held re: Motion to Dismiss by Porter
11/15/99	ENDORSEMENT denying motion for Entry of Default as to Willette (signed by Judge Alan H. Nevas)
11/22/99	RULING granting Motion to Dismiss (signed by Judge Alan H. Nevas)
11/23/99	JUDGMENT for Willette, Porter against Ronald Nussle (signed by Mag. Judge Joan G. Margolis)
11/23/99	Case closed
12/3/99	NOTICE OF APPEAL of judgment order by Ronald Nussle Certified Copy of Appeal and Docket mailed to USCA

RELEVANT DOCKET ENTRIES:
SECOND CIRCUIT COURT OF APPEALS
CASE No. 99-0387

12/28/99	Copy of notice of appeal and district court docket entries on behalf of Appellant Ronald Nussle filed.
12/28/99	Copy of district court ruling dated Nov. 22, 1999 and endorsed by Hon. AHN, DJ, RECEIVED
12/28/99	Copy of district court order dated Nov. 4, 1999 and endorsed by Hon. AHN, DJ, RECEIVED
2/2/00	Appellant Ronald Nussle brief RECEIVED
2/2/00	Appellant Ronald Nussle appendix/ addendum received
2/10/00	Record on appeal index in lieu of record filed
2/10/00	Appellant Ronald Nussle brief FILED with proof of service
2/10/00	Appellant Ronald Nussle appendix filed w/pfs.
3/7/00	A PANEL proposed for argument the week of 5/1/00

3/20/00	Appellee Willette, CO, Appellee Porter, CO brief RECEIVED
3/22/00	Set for argument on 5/3/00 A PANEL
5/3/00	Case heard before CALABRESI, PARKER, STRAUB, C.JJ.
8/24/00	Judgment of the district court is VACATED & REMANDED by published signed opinion filed
8/24/00	Judgment filed
9/19/00	Judgment MANDATE ISSUED
12/4/00	Notice of filing petition for writ of certiorari dated November 29, 2000 filed. Supreme Ct#: 00-0853
6/7/01	Letter dated June 4, 2001 from the Supreme Court advising of order GRANTING petition for writ of certiorari [1751089-1] endorsed on motion form dated 12/4/00 filed (Supreme Court # 00-853). "The Court today entered the following order in the above entitled case: The petition for a writ of certiorari is granted." [William K. Suter, Clerk]

STATE OF CONNECTICUT
DEPARTMENT OF CORRECTION
ADMINISTRATIVE DIRECTIVE
Directive Number 9.6

Effective Date - August 12, 1994
Supersedes: INMATE GRIEVANCES - 2/7/94
Title: INMATE GRIEVANCES
Approved by _____
/s/ Larry Meachum 8/11/94

1. Policy. The Department of Correction shall provide a means for inmates to address their grievances. The Inmate Grievance Procedure shall be an administrative remedy which enables the Department to resolve legitimate grievances in a timely manner, to identify individual and systemic problems, and to facilitate the accomplishment of its mission.

2. Authority and Reference.

A. Connecticut General Statutes, Section 18-81.
B. 42 United States Code 1997e.
C. 28 Code of Federal Regulations 40.
D. American Correctional Association, Standards for Adult Community Residential Services, Second Edition, August 1980, Standard 2-2154.
E. American Correctional Association, Standards for Adult Probation and Parole Field Services, Second Edition, March 1981, Standard 2-3163.
F. American Correctional Association, Standards for Adult Correctional Institutions, Third Edition, January 1990, Standard 3-4271.
G. American Correctional Association, Standards for Adult Local Detention Facilities, Third Edition, March 1991, Standard 3-ALDF-3E-11.

H. 1990 Americans with Disabilities Act.

I. Administrative Directives 6.10, Inmate Property; 6.14, Security Risk Group; 9.1; Population Management; 9.2, Inmate Classification; and 9.5, Code of Penal Discipline.

3. Definitions. For the purposes stated herein, the following definitions apply:

A. Abuse. The filing of repetitive grievances addressing the same issue where sufficient time for response has not elapsed or where a valid response has been provided; the filing of an excessive number of grievances; the appeal of a grievance settled in the inmate's favor at a lower level; the filing of harassing grievances; or the intentional filing of emergency grievances which are not emergencies.

B. Emergency Grievance. A grievance processed by expedited methods to resolve an issue which presents: (1) a threat of death or injury; (2) a threat of disruption of facility operations; or (3) a need for prompt disposition because the time is lapsing when meaningful action or decision is possible.

C. Grievance. A written complaint filed by an inmate on the inmate's own behalf in accordance with the procedures stated herein.

D Grievance Coordinator. An employee of the unit designated to coordinate the Inmate Grievance Procedure.

E. Inmate. A person in the custody of the Department of Correction to include those confined in a facility or under community supervision.

F. Unit. An organizational component of the Department, including correctional institutions, correctional centers, detention

centers, DWI units, community service districts and the health services division.

G. Unit Administrator. The person in charge of a unit specified in (F) above.

4. Notice.

A. The Inmate Grievance Procedure shall be published in English and Spanish. Each inmate, direct contact employee and direct contact contractor shall be issued a written summary of the Inmate Grievance Procedure upon initial contact with the Department. An inmate whose primary language is Spanish shall receive a copy written in Spanish. Appropriate provision shall be made for those who do not read, speak or understand English and Spanish. Inmates who are impaired or disabled shall receive assistance as necessary.

B. English and Spanish copies of the Inmate Grievance Procedure shall be available in each inmate library and shall be provided to an inmate upon request.

C. An inmate shall receive oral instruction about the Inmate Grievance Procedure, filing of a grievance and obtaining grievance forms. This instruction shall encourage questions and take place as part of the orientation curriculum, not later than two (2) weeks after admission.

D. Staff shall receive oral instruction regarding the Inmate Grievance procedure during orientation training and upon assignment to a new unit.

E. Upon transfer, an inmate shall be informed of the Inmate Grievance Procedure at the receiving unit.

5. Access. Each inmate in the Department's custody shall have access to the Inmate Grievance Procedure. Special provisions shall be made to

ensure access for the impaired or disabled, illiterate or those with language barriers.

A. Any inmate who needs assistance in using the Inmate Grievance Procedure shall receive assistance upon request.

B. Access shall only be limited as a result of abuse of the Inmate Grievance Procedure in accordance with Section 19 below or failure to comply with the process.

6. Grievable Matters.

A. Grievable. The following matters are grievable:

1. The interpretation and application of policies, rules and procedures of the unit, division and Department.
2. The existence or substance of policies, rules and procedures of the unit, division and Department in accordance with Section 13 below.
3. Individual employee and inmate actions including any denial of access of inmates to the Inmate Grievance Procedure other than as provided herein.
4. Formal or informal reprisal for use of or participation in the Inmate Grievance Procedure.
5. Any other matter relating to access to privileges, programs and services, conditions of care or supervision and living unit conditions within the authority of the Department of Correction, to include rights under the Americans with Disabilities Act, except as noted herein.
6. Property loss or damage.

B. Non-Grievable. The following matters are not grievable:

1. State and federal laws and regulations.
2. State and federal court decisions.
3. Actions pursuant to the Code of Penal Discipline, which are appealable through the disciplinary procedure provided in Administrative Directive 9.5., Code of Penal Discipline.
4. Classification decisions, which are appealable through the classification procedure provided in Administrative Directive 9.2, Inmate Classification.
5. The individual designation of an inmate as a Security Risk Group Member or a Security Risk Group Safety Threat Member in accordance with Administrative Directive 6.14, Security Risk Groups.
6. Health Services diagnosis or treatment decisions which are appealable through the Health Services appeal process.
7. Matters beyond the control of the Department, including parole decision.

7. Disposition and Remedy. Grievances shall either be rejected, denied, upheld or disposed by mutual agreement. Grievances that are upheld shall be given an appropriate and meaningful remedy. Such remedies may include, but not be limited to:

A. Corrective action to rectify the matter being grieved.

B. Changes in written policy and procedures or in interpretation or application of written policies and procedures.

C. Enforcement of existing policy and procedure.

D. Development of policies and procedures pertaining to the grievance.

8. Administrative Provision. Each Unit Administrator shall establish unit directives consistent with the Inmate Grievance Procedure and the type of unit, which shall include at a minimum:

A. The designation of a staff person, to be known as the Grievance Coordinator, whose scope of authority and responsibility shall be defined by the Unit Administrator.
B. Notification procedures to inmates of the name of the Grievance Coordinator.
C. Provision for adequate numbers of collection boxes at various unit locations for the deposit of grievances. Units shall provide locked boxes for depositing grievances.
D. Procedures for the regular and timely collection and appropriate logging of grievances.
E. Procedures for the prompt handling of all emergency grievances.
F. Procedures to assure that no employee or inmate shall participate in the resolution of a grievance in which the employee or inmate is allegedly involved.
G. Procedures to provide notice of and access to the Inmate Grievance Procedure for all inmates including the impaired, disabled, illiterate and those with language barriers.

9. Informal Resolution. An inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with staff able to resolve the matter or utilization of the Inmate Request System. Access to the Inmate Request System shall be through the use of the Inmate Request Form, Attachment B. A clear statement of the problem and action requested should be written by the inmate and sent to the

appropriate unit Department Head or employee. Inmate Request Forms shall be available in all units. Response to the inmate shall be made within 15 calendar days from receipt of the request.

10. Filing a Grievance. An inmate shall attempt to resolve a problem through the Inmate Request System prior to filing a grievance. The inmate shall attach the Inmate Request Form CN 9602, Attachment B, containing the appropriate staff member's response, to the Inmate Grievance Form which requirement may be waived for an emergency grievance. If the inmate was unable to obtain a blank Inmate Request Form, did not receive a timely response to the Inmate Request, or for a similar valid reason, the inmate shall include an explanation as to why the Inmate Request Form is not attached. A grievance may be rejected for failure to attempt informal resolution. A grievance shall be filed in accordance with the following provisions:

A. A grievance must be filed, in writing, on the Inmate Grievance Form CN 9601, Attachment A. Grievance forms shall be readily accessible to inmates.
B. The grievance must be filed by an inmate who is personally affected by the grievance subject and shall not be filed by one inmate on behalf of another.
C. Each grievable matter shall be submitted on a separate Inmate Grievance Form.
D. The grievance and the action requested shall be stated simply and coherently.
E. The length of the grievance shall be restricted to the space available on the fact of the grievance form and one (1) additional 8 1/2 x 11 inch page.
F. The grievance shall be free of obscene or vulgar language or content.
G. The grievance must be filed within 30 days of the occurrence or discovery of the cause of the grievance.

H. A repetitive grievance may not be filed by the same inmate when a final response has been provided and there has been no change in any circumstances that would affect the response; or when the initial grievance is stall in process.

The Inmate Grievance Procedure is an administrative remedy. Inmates contemplating litigation against the Department may be required by the courts to have exhausted this remedy before a suit may be filed.

11. Rejection of Grievance. Any grievance which does not meet the criteria specified in Section 6(A) or the procedural requirements of Section 10 of the Inmate Grievance Procedure may be rejected. Any grievance rejected at any level of the Inmate Grievance Procedure may be appealed to the next level. A grievance which does not comply with the procedures in the Inmate Grievance Procedure shall be returned to the grievant stating that the grievance is not in compliance and citing the specific procedural errors. Any grievance not in compliance with Section 10(G) cannot be corrected.

12. Appeals. A response to a grievance may be appealed to the next level as provided for in Sections 16 and 17. An appeal should be deposited in the Grievance Box or sent to the Grievance Coordinator.

With the consent of the grievant, a reviewer may extend the time limit for a response up to 15 days using the Request for Time Extension Form, CN 9603. A grievant may request a time extension of up to 15 days to file an appeal by sending a written Inmate Request Form to the Grievance Coordinator. A request by the grievant may be granted at the discretion of the reviewer to whom the appeal is to be sent.

13. Appropriate Review. A grievance about a matter that is beyond the authority of lower level(s) of review may be sent by the lower level reviewer directly to the appropriate level of review. In such case the time limit(s) of the lower level(s) shall be combined with the time limit of the appropriate review level and the grievant shall be notified of the review process and of the time frame for response. If the grievance is upheld, the time necessary to implement the change(s) may exceed the time limit for review.

14. Medical Grievances. All health care related grievances shall be placed in a box designated for health services grievances and shall be processed by the designated Health Services Grievance Coordinator.

15. Level 1 Review. The Level 1 review shall be made by the Facility Administrator, Community Services Unit Administrator or ranking facility Health Services administrator/supervisor, as appropriate. The grievance shall be reviewed for compliance with the Inmate Grievance Procedure and investigated if the grievance is accepted. The response shall be in writing within 30 calendar days and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. The appropriate administrator shall notify the inmate of the Level 1 disposition and shall include directions for appealing to Level 2.

16. Level 2 Review. An inmate may appeal a Level 1 action to Level 2 within five (5) calendar days of receipt of the decision. The Level 2 review shall be made by the Director of the Region, Director of Community Services or Regional Health Services Administrator, as appropriate. If a timely response to a Level 1 grievance is not received, an inmate may appeal to Level 2, one (1) day after the authorized time limit expires. The response shall be

in writing within 25 calendar days and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. Level 2 shall be the final level of appeal for all grievances except as provided in Section 17 below.

17. Level 3 Review. Level 3 review is restricted to a grievance which challenges Department level policy; appeals for an emergency grievance which cannot be acted upon at a subordinate level; appeals which challenge the integrity of the grievance procedure; appeals for which a timely response to a Level 2 grievance is not received; and appeals of a grievance rejected at Level 2. If a timely response to a Level 2 grievance is not received an inmate may appeal to Level 3 one (1) day after the authorized time limit expires. An appeal to Level 3 must be submitted within five (5) calendar days of receipt of a Level 2 decision. The Level 3 review shall be made by the Commissioner. The response shall be in writing, within 25 days, and shall include a statement of the remedy for a grievance which is upheld, or of the reason a grievance is denied or rejected. Level 3 shall be the final level of appeal for all grievances.

18. Emergency Grievances.

A. Identification. An inmate filing an emergency grievance must plainly mark the grievance as "Emergency".

B. Expedited Process. Each Unit Administrator shall develop unit directives for handling emergency grievances, including procedures for assessing the emergency and expediting resolution, or forwarding the grievance without delay to the decision-maker who can resolve the matter.

C. Time Limits. An emergency grievance that requires action within the unit shall receive a

response within eight (8) hours followed by a written response within three (3) business days. An emergency grievance that requires substantive response beyond the unit or that is appealed to Level 2 or Level 3 shall receive a response in two (2) business days and a written response in five (5) business days. An emergency grievance that will be mooted by the passage of time specified for emergency grievances shall normally receive a verbal or other response prior to that time.

D. Records. Following notification of the Unit Administrator, the grievance shall be recorded in accordance with the provisions for other grievances except it shall be denoted as an emergency.

E. Rejection. If a grievance submitted as an emergency is ruled at any level not to be an emergency, it shall be returned to the grievant stating that the grievance is not an emergency and the reasons why. The response shall indicate that the grievance may be resubmitted as a regular grievance. No emergency grievance shall be rejected solely for failure to follow the procedures in the Inmate Grievance Procedure and any unit directives.

19. Abuse. Abuse of the Inmate Grievance Procedure shall be determined by the Unit Administrator on a case by case basis. A determination of abuse and any resulting limitation may be appealed to Level 2. An inmate who files five (5) or more grievances in a week or 20 or more in any 180 day calendar period may be determined to be abusing the Inmate Grievance Procedure. An inmate may be limited to not more than 10 active grievances at a time not including any emergency grievance or grievance relating to the inmate's property as specified in Administrative Directive 6.10, Inmate Property.

A. A determination of abuse shall result in a limitation on the grievance filing process or on a particular subject. The Unit Administrator shall establish the length of limitation commensurate with the degree of abuse. The length of limitation may be for up to six (6) months and may be increased for second and subsequent abuse in increments not to exceed six (6) months. Inmates under limitation for abuse of the Inmate Grievance Procedure shall be allowed to file emergency grievances. Abuse of the emergency Inmate Grievance Procedure may result in limitation of the use of the emergency Grievance Procedure as well.

B. A limitation of access shall be communicated to the receiving units upon transfer, and may be reviewed by the receiving Unit Administrator.

C. Notice of limitation shall be made in writing to the inmate.

20. Records.

A. Description.

1. Grievance File. A grievance file shall be maintained at each level for each grievance. The grievance file shall include a copy of the grievance, each response, and any supporting documents submitted in support of the grievance, presented during investigation, or relied upon in the decision.

2. Grievance Log. The Grievance Log CN 9604, Attachment D, shall be maintained at each level and shall include the name and number of the grievant, the dates of initial receipt and of the response at that level, a brief description of the problem and the disposition.

B. General Requirements.

1. Each unit shall use the grievance log format and the Inmate Grievance Form.
2. The grievance file and the grievance log shall be systematically maintained by the Grievance Coordinator.
3. Each grievance log shall be retained as the official record and for data collection purposes.

C. Retention. A copy of each completed grievance shall be maintained at the unit for a minimum of three (3) years following final disposition of the grievance.

D. Restriction. No copy of a grievance or adverse reference to any grievance shall be placed in an inmate's Master file.

E. Confidentiality. The confidentiality of the contents of the grievance file, the grievance log, and any record of an inmate's participation in any grievance proceeding shall be maintained in accordance with the existing state statutes and regulations. All files shall be maintained in a locked cabinet not accessible to any person other than the Grievance Coordinator or Level 1 Reviewer. Grievance Coordinators involved in the disposition of a grievance shall have access to records and information essential to the resolution of the grievance. This section shall not be cause for immunity from disciplinary action based on statements made in a grievance.

21. Reprisal Against Staff. No staff member who participates in the resolution of a grievance shall be affected negatively for participation in the solution of a grievance.

22. Reprisal Against Inmates. No inmate shall suffer negative consequences such as denial or limitation of access to any privilege, service or program offered by the unit either formally or informally for good faith use or participation in the Inmate Grievance Procedure.

23. Monitoring and Evaluation. The Unit Administrator shall conduct an evaluation of the Inmate Grievance Procedure in January of each year. Inmates and employees shall be afforded an advisory role in the evaluation which shall include a review of both the effectiveness and credibility of the Inmate Grievance Procedure and recommendations for revision. An annual report shall be presented to the Commissioner by March 1 of each year. The report shall include the findings and recommendations of the evaluation process, statistical data regarding the number and type of grievances, types of dispositions and level of disposition, sample responses from each level, remedies granted, and evidence of compliance with time limits at each level of decision.

24. Exceptions. Any exception to the procedures in this Administrative Directive shall require prior written approval from the Commissioner.

42 U.S.C. § 1997e. Suits by prisoners

(a) Applicability of administrative remedies. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure. The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 3 or 5 of this Act [42 USCS § 1997a or 1997c].

(c) **Dismissal.**

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

(d) **Attorney's Fees**

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)

(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. 1988).

(e) **Limitation on recovery.** No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

(f) **Hearings.**

(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner's participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

(g) **Waiver of reply.**

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.

(h) **"Prisoner" defined**. As used in this section, the term "prisoner" means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

18 USCS § 3626 (2001)

§ 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.

(1) Prospective relief.

(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief. In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm.

The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.

(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.

(1) Termination of prospective relief.

(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act [enacted April 26, 1996], 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that

prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief. Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise be legally permissible.

(c) Settlements.

(1) Consent decrees. In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.

(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies. The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.

(1) Generally. The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay. Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A) (i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay. The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay. Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.

(1) In general.

(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.

(A) If the court determines that the appointment of a special master is necessary, the court shall request that

the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal. Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation. The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment. In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties. A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications ex parte;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions. As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the

consent or acquiescence of the parties but does not include private settlements;

(2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term "prisoner" means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

(5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

HISTORY: (Added Sept. 13, 1994, P.L. 103-322, Title II, Subtitle D, § 20409(a), 108 Stat. 1827; April 26, 1996, P.L. 104-134, Title I [Title VIII, § 802(a)], 110 Stat. 1321-66; May 2, 1996, P.L. 104-140, § 1(a), 110 Stat. 1327; Nov. 26, 1997, P.L. 105-119, Title I, § 123(a), 111 Stat. 2470.)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment--

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code, in conformity with and subject to the limitations of that section;

(4) the power to enter a sentence for a petty offense; and

(5) the power to enter a sentence for a class A misdemeanor in a case in which the parties have consented.

(b)

(1) Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of

the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts.

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary--

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any

other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. The consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(5) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken

pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(6), (7) [Redesignated]

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USCS §§ 631 et seq.] shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) Contempt authority.

(1) In general. United States magistrate judge serving under this chapter [28 USCS §§ 631 et seq.] shall have within the territorial jurisdiction prescribed by the appointment of such magistrate judge the power to exercise contempt authority as set forth in this subsection.

(2) Summary criminal contempt authority. A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of the authority of such magistrate judge constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of justice. The order of contempt shall be issued under the Federal Rules of Criminal Procedure.

(3) Additional criminal contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge shall have the power to punish, by fine or imprisonment, criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing under the Federal Rules of Criminal Procedure.

(4) Civil contempt authority in civil consent and misdemeanor cases. In any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, and in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, the magistrate judge may exercise the civil contempt authority of the district court.

This paragraph shall not be construed to limit the authority of a magistrate judge to order sanctions under any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

(5) Criminal contempt penalties. The sentence imposed by a magistrate judge for any criminal contempt provided for in paragraphs (2) and (3) shall not exceed the penalties for a Class C misdemeanor as set forth in sections 3581(b)(8) and 3571(b)(6) of title 18.

(6) Certification of other contempts to the district court. Upon the commission of any such act--

(A) in any case in which a United States magistrate judge presides with the consent of the parties under subsection (c) of this section, or in any misdemeanor case proceeding before a magistrate judge under section 3401 of title 18, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection, or

(B) in any other case or proceeding under subsection (a) or (b) of this section, or any other statute, where--

(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in paragraph (5) of this subsection,

(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

(iii) the act constitutes a civil contempt, the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

(7) Appeals of magistrate judge contempt orders. The appeal of an order of contempt under this subsection shall be made to the court of appeals in cases proceeding under subsection (c) of this section. The appeal of any other order of contempt issued under this section shall be made to the district court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a), (b), or (c) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 and the appointment of counsel authorized by section 4109 of title 18, United States Code, and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations

promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

HISTORY: (June 25, 1948, ch 646, § 1, 62 Stat. 917; Oct. 17, 1968, P.L. 90-578, Title I, § 101, 82 Stat. 1112; Mar. 1, 1972, P.L. 92-239, §§ 1, 2, 86 Stat. 47; Oct. 21, 1976, P.L. 94-577, § 1, 90 Stat. 2729; Oct. 28, 1977, P.L. 95-144, § 2, 91 Stat. 1220; Oct. 10, 1979, P.L. 96-82, § 2, 93 Stat. 643; Oct. 12, 1984, P.L. 98-473, Title II, Ch I, § 208, 98 Stat. 1986; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(29)(B), 98 Stat. 3359; Nov. 14, 1986, P.L. 99-651, Title II, § 201(a)(2), 100 Stat. 3647.) (As amended Nov. 15, 1988, P.L. 100-659, § 4(c), 102 Stat. 3918; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle H, § 7322, 102 Stat. 4467; Nov. 19, 1988, P.L. 100-702, Title IV, § 404(b)(1), Title X, § 1014, 102 Stat. 4651, 4669 Dec. 1, 1990, P.L. 101-650, Title III, § 308(a), 104 Stat. 5112; Oct. 19, 1996, P.L. 104-317, Title II, §§ 201, 202(b), 207, 110 Stat. 3848, 3849, 3850; Nov.13, 2000, P.L. 106-518, §§ 202, 203(b), 114 Stat. 2412, 2414.)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	3:99CV01091 (AHN)
Plaintiff,	:	
	:	
v.	:	
	:	
C.O. WILLETTE,	:	
C.O. PORTER,	:	
Defendants.	:	JUNE 10, 1999

COMPLAINT

1. This is a lawsuit arising out of the lawless acts of violence by the defendants, corrections officers at the Cheshire Correctional Institution against the plaintiff. The plaintiff claims abridgement of his rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and his right to substantive due process arising under the Fourteenth Amendment to the United States Constitution. He also claims violation of his right to be free from assault and battery under Connecticut law as a pendent state-law claim.

2. Jurisdiction of this court is invoked under provisions of §§ 1331, 1343(3) and 1367(a) of Title 28 and §§ 1983 and 1988 of Title 42 of the United States Code.

3. The plaintiff, RONALD NUSSLE, was at all times relevant to this Complaint, and remains, an inmate in the care and custody of the State of Connecticut Department of Correction. He was at all times relevant to this Complaint, an inmate at the Cheshire Correctional Institution.

4. Defendant Corrections Officer WILLETTE was, at all times relevant to this Complaint, a corrections

officer employed by the State of Connecticut at the Cheshire Correctional Institution. He is sued in his individual capacity only.

5. Defendant Corrections Officer PORTER was, at all times relevant to this Complaint, a corrections officer employed by the State of Connecticut at the Cheshire Correctional Institution. He is sued in his individual capacity only.

6. At all times relevant to this Complaint, the defendants each of them were acting under color of law, that is, under color of the Constitution, statutes, laws, regulations, customs and usages of the State of Connecticut.

7. At all times relevant to this Complaint, the defendants were acting jointly and in concert with each other. Each defendant had the duty and the opportunity to protect the defendant but each defendant failed and refused to perform such duty, thus proximately causing the plaintiff's injuries.

8. On or about June 15, 1996, the plaintiff was an inmate at the Cheshire Correctional Institution.

9. Beginning upon the plaintiff's arrival at the Cheshire Correctional Institution in May 1996, he was made the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers because the plaintiff was perceived as a friend of Gov. John G. Rowland. He was told: "Tell your friend Rowland to give us a raise."

10. On or about June 15, 1996, defendants Willette and Porter together with unknown Corrections officers, entered the plaintiff's cell and told him to leave the cell.

11. The defendants placed him against a wall and struck him with their hands, kneed him in the back, pulled his hair. The plaintiff was beaten so badly he lost control of his bowels. All of these acts of violence were done without provocation and without justification in that the plaintiff did not disobey an order or otherwise resist the defendants in the lawful performance of their duties.

12. The plaintiff was told that if he reported this beating the guards would kill him.

13. At a direct and proximate result of the beating described above, the plaintiff suffers, and continues to suffer, numbness in his right leg. He also suffered bruises, lacerations, physical pain and emotional distress.

14. The acts of each and every defendant named in this suit were intentional, reckless or in wilful disregard of the plaintiff's clearly established Constitutional rights.

15. The acts of each and every defendant named in this suit were sadistic and were motivated by a desire to cause physical pain and terror.

16. In the manner described herein, the defendants deprived the plaintiff to his rights to freedom from cruel and unusual punishment. The defendants also violated the plaintiff's right to substantive due process.

WHEREFORE, the plaintiff claims judgment against the defendants and each of them, jointly and severally as follow:

A. Compensatory damages in an amount this Court shall consider to be just, reasonable and fair;

B. Punitive damages in an amount this Court shall consider to be just reasonable and fair;

C. Attorney fees and the costs of this action;

D. Such other relief as this Court shall deem fair and equitable.

PLAINTIFF'S JURY CLAIM

The plaintiff claims a trial by jury for all issues raised in this complaint.

THE PLAINTIFF
By: _____
/s/NORMAN A. PATTIS
Williams, Polan & Pattis, LLC
51 Elm St., Suite 409
New Haven, CT 06510
Fed. Bar No. 13120
(203) 562-9931

UNITED STATES DISTRICT COURT

STATE OF CONNECTICUT

RONALD NUSSLE,	:	CIVIL NO.
Plaintiff,	:	3:99CV01091(AHN)
	:	
vs.	:	
	:	
CORRECTIONAL OFFICERS		
WILLETTE	:	
AND PORTER,	:	
Defendants.	:	AUGUST 20, 1999

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, Defendant Correctional Officer Porter[1/], respectfully requests this Court to dismiss this lawsuit against him, in its entirety, for the following reasons:

A. The plaintiff has failed to state a claim upon which relief can be granted, because he has failed to exhaust his administrative remedies.

WHEREFORE, Defendant Porter respectfully requests that his Motion to Dismiss be granted in its entirety.

1/ Co-defendant Correctional Officer Willette is not represented by the undersigned counsel for Defendant Porter, and thus his interests are not represented in this Motion.

DEFENDANT
Correctional Officer Porter

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Robert B. Fiske, III
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105
Tel: (860)808-5450
Fed. No. ct17831

CERTIFICATION

I hereby certify that a copy hereof was mailed this,

the 20th day of August, 1999 to:

Mr. Norm Pattis
Williams, Polan & Pattis
51 Elm Street, Suite 409
New Haven, CT 06510

/s/ Robert B. Fiske, III
Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE :

v. : 3:99CV1091(AHN)

C.O. WILLETTE, ET AL :

RULING ON MOTION TO DISMISS

The plaintiff, Ronald Nussle ("Nussle"), brings this action against the defendants, correctional officer Willette ("Willette") and correctional officer Porter ("Porter"), alleging violations of 42 U.S.C. § 1983,[2/] as well as a state law claim for assault and battery.

2/ Specifically, Nussle alleges violation of his substantive due process rights under the Fourteenth Amendment. He also alleges the use of excessive force by the defendants in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Nussle's substantive due process claim is based on the same facts as his excessive force claim. However, in *Whitley v. Albers*, 475 U.S. 312, 326-27 (1986), the United States Supreme Court recognized that, while the same facts may state a claim under the Eighth Amendment for cruel and unusual punishment as well as a substantive due process claim under the Fourteenth Amendment, after conviction, "the Eighth Amendment, which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, serves as the primary source of substantive protection...in cases...where the deliberate use of force is challenged as excessive and unjustified." *Whitley*, 475 U.S. at 327; *see also Meriwether v.*

Now pending before the Court is Porter's motion to dismiss Nussle's entire complaint. For the reasons that follow, the motion [doc. #8] is GRANTED.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), the court is required to accept as true all factual allegations in the complaint and must construe any well-pleaded factual allegations in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991). A court may dismiss a complaint only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Still v. DeBuono*, 101 F.3d 888 (2d Cir. 1996). The issue on a motion to dismiss "is not whether the plaintiff will prevail, but whether he is entitled to offer evidence to support his claims." *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer*, 416 U.S. at 236). In deciding such a motion, consideration is limited to the facts stated in the complaint or in documents attached thereto as exhibits or incorporated therein by reference. *See Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991).

FACTS

The plaintiff, an inmate in the custody of the State of Connecticut Department of Correction at Cheshire Correctional Institute ("Cheshire"), both now and at all times relevant to this lawsuit, alleges that the defendants made him the target of a prolonged and sustained pattern of intimidation. (See Pl.'s Compl. ¶¶ 7, 9.) Specifically, Nussle alleges that on June 15, 1996, the defendants, together with other unknown correctional officers, entered his cell, placed him against the wall and, without provocation or justification, proceeded to violently beat him. (*See id.* ¶¶ 10, 11.) Nussle further alleges that the defendants told him he would be killed if he reported the incident. (*See id.* ¶ 12.) Nussle contends that as a result of the alleged assault he suffers from physical and emotional distress. (*See id.* ¶ 13.) He is seeking compensatory and punitive damages as well as attorney's fees and costs of this action.

DISCUSSION

Porter maintains that 42 U.S.C. § 1997e(a) of the Prison Legal Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) ("PLRA"), precludes an inmate from bringing a § 1983 lawsuit in federal court if the inmate has failed to exhaust administrative remedies within the Department of Corrections ("DOC"). Porter asserts that this action is governed by the PLRA because Nussle's claim of excessive force involves prison conditions. He contends that Nussle's failure to file a formal complaint under the DOC's inmate grievance procedures[3/] or to try to

Thus, "any protection [the Fourteenth Amendment] affords convicted prisoners against excessive force is at best redundant of that provided by the Eighth Amendment." *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 1870-71 n. 10 (1989) (explaining that actions which are protected under specific constitutional provisions should be analyzed under those provisions and not under "the more generalized [provisions] of substantive due process"); *see also Whitley*, 475 U.S. at 327 (noting that in the context of excessive force claims, the Due Process Clause provides prisoners no greater protection than the Eighth Amendment). Accordingly, in this case, Nussle's claim will be analyzed solely under the Eighth Amendment, and his claim under the Fourteenth Amendment is dismissed.

3/ Specifically, Porter maintains that Nussle was required to follow the procedures set forth in the DOC's Administrative Directive 9.6. Subsection 6

informally resolve it under the DOC procedures[4/] renders his complaint premature and that dismissal is thus required.

In response, Nussle asserts that the exhaustion requirement of the PLRA does not apply in this case because he is not alleging that the conditions of his confinement are unlawful, but is only alleging a violation of his Eighth and Fourteenth Amendment rights. He further contends that exhaustion in this case would be futile because the DOC grievance procedures do not address excessive force claims made by prisoners against officers and because he is seeking compensatory and punitive damages, which cannot be recovered in a DOC grievance hearing.

I. PLRA

42 U.S.C. § 1997e(a) provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner...until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The intended purpose of the PLRA was to limit frivolous prisoner lawsuits, which had comprised more than twenty-five percent of all cases filed in the United States District Courts. See 141 Cong. Rec. s7498-01, *7526 (daily ed. May 25, 1995) (statement of Senator Kyl).

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of Administrative Directive 9.6 covers matters that are grievable by inmates. It provides that "[a]ny other matter relating to . . . conditions of care or supervision" is grievable through the DOC's administrative procedures (See Administrative Directive 9.6, subsection 9.6.A.5.).

4/ Subsection 9 of Administrative Directive 9.6 states that "[a]n inmate shall attempt to seek informal resolution prior to filing an inmate grievance. Informal resolution includes personal contact with the staff able to resolve the matter...."

Although the PLRA requires exhaustion, there is no consensus among the circuits as to the circumstances when exhaustion is required and when it is not required. In fact, the district courts in the Second Circuit are not in agreement on this issue. Specifically, there is a difference of opinion on the two issues that are implicated here: (1) whether the exhaustion requirement applies where the relief requested, i.e., money damages, is not available through the administrative process; and (2) whether cases alleging the use of excessive force are actions "with respect to prison conditions" as that phrase is used in 42 U.S.C. § 1997e(a).

A. Administrative Remedies

Courts are not in agreement as to whether § 1997e(a) applies where prisoners seek money damages and such relief cannot be obtained in the administrative process. *Compare Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (discussing the split among circuits on the issue and holding that the inmate was not required to exhaust administrative remedies where remedy sought was not available in prison's administrative system); and *Garret v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1997) (holding that § 1997e(a) applies only to the extent that the administrative process provides the relief requested); *with Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532 (7th Cir. 1999) (holding that neither assertion that exhaustion would be futile nor alleged unavailability of administrative remedy negated exhaustion requirement).

The cases which have held that exhaustion is not required reason that an administrative process that does not provide the particular form of relief sought, i.e, money damages, does not provide an "available remedy" within the meaning of § 1997e(a). See *e.g., Perez*, 182 F.3d at 535. In such a case, exhaustion is found to be futile and an unnecessary roadblock to a prisoner's federal claim. *See id.*

The cases which find that exhaustion is required regardless of whether the relief is available focus on the fact that Congress changed the language of § 1997e(a) when the Act was amended in 1996. Prior to the amendment, the Act

provided that prisoners were required to exhaust "plain, speedy and effective" administrative remedies. See *Beeson v. Fishkill Correctional Facility*, 28 F.Supp.2d 884, 892-94 (S.D.N.Y. 1998). Now, § 1997e(a) provides for exhaustion of "available" remedies. See § 1997e(a). Accordingly, this line of cases construe the amendment as requiring exhaustion without regard to whether the remedy is "effective." *See Beeson*, 28 F. Supp.2d at 893. To hold otherwise would essentially reintroduce the requirement that the remedy be "effective," despite the fact that Congress deleted it. *See Vasquez v. Artuz*, No. 97cv8427(JP), 1999 WL 440631 (S.D.N.Y. June 28, 1999). Moreover, because prisoners almost always seek money damages, crafting such an exception would effectively remove the exhaustion requirement entirely.[5/] *See id.* at *6. The Court finds this reasoning persuasive.

In addition, if exhaustion were required only in cases where the relief sought was available, there would be little, if any, effect on the flow of meritless prisoner cases filed in federal court in contravention of Congressional intent. *See* 141 Cong. Rec. s7525 (statement of Sen. Kyl). Moreover, exempting cases that seek money damages from the exhaustion requirement would involve federal courts in the tedious and intrusive process of "evaluat[ing] each cause of action and each type of relief sought in each prisoner's complaint [in order to] determine whether the [relevant administrative system] can grant adequate relief[;]" a result Congress plainly meant to avoid. *See Vasquez*, 1999 WL 440631, *6 (quoting *Alexender v. Hawk*, 159 F.3d 1321, 1326-27 (11th Cir. 1998)) (internal quotations omitted). Consequently, mandatory exhaustion will encourage prisoners to comply with administrative procedures by forcing them to report their complaints to prison officials promptly or risk forfeiture of such claims. *See Beeson*, 28 F.Supp.2d at 895. "In contrast, exempting money damages claims from the [exhaustion] requirement [of § 1997e(a)] would undermine whatever incentive inmates have to report their claims promptly because they could bring an action in federal court any time within the applicable statute of

5/ In fact, at oral argument, counsel for Nussle conceded this point.

limitations." *Id.* For these reasons, the fact that prisoners cannot recover money damages in an administrative grievance before the DOC is not a sufficient basis to avoid § 1997e(a)'s exhaustion requirement.

B. Excessive Force Claims

Court have also differed about whether cases alleging excessive force are actions "with respect to prison conditions" as that phrase is used in § 1997e(a). *Compare Carter v. Kiernan*, No. 98cv2664, 1999 WL 14014, at *2-4 (S.D.N.Y. Jan. 14, 1999) (holding that Eighth Amendment excessive force claims are not subject to PLRA exhaustion requirement); and *Baskerville v. Goord*, No. 97cv6413, 1998 WL 778396, at *3-6 (S.D.N.Y. Nov. 5, 1998) (holding that exhaustion requirement does not apply to Eighth Amendment excessive force claims); and *White v. Fauver*, 19 F. Supp.2d 305, 312-15 (D.N.J. 1998) (holding the same); with *Beeson v. Fishkill Correctional Facility*, 28 F. Supp.2d 884, 887-96 (S.D.N.Y. 1998) (holding that Eighth Amendment excessive force claims are subject to exhaustion requirement); and *Moore v. Smith*, 18 F.Supp.2d 1360, 1362-63 (N.D. Ga. 1998) (concluding the same).

Although the issue was recently before the Second Circuit, that court has yet to decide it. See *Liner v. Goorde*, No. 98-2925, 1999 WL 734693 (2d Cir. Sept. 22, 1999). In *Liner*, a prisoner brought a § 1983 excessive force claim which the district court dismissed sua sponte before the defendants were served. The court declined to resolve this complex legal issue without the benefit of a more complete record. *See id.*

Nonetheless, even without guidance from the Second Circuit on this complex issue, the Court concludes that the exhaustion requirement applies to cases alleging excessive force. The express language of the PLRA provides for exhaustion of administrative remedies before a prisoner may bring a federal action relating to "prison conditions." *See Beeson*, 28 F.Supp.2d at 887-92. The use of excessive force by correctional officers falls into the category of "prison conditions."

Moreover, there is no support in the legislative history of the PLRA that, as Nussle argues, Congress intended to exempt excessive force claims from the exhaustion requirement. See 141 Cong. Rec. s7525 (statement of Sen. Kyl) (explaining the serious problem regarding the high number of meritless prisoner claims brought in federal court). To the contrary, the legislative history indicates that Congress intended to include excessive force claims within the coverage of § 1997e(a)'s exhaustion requirement. *See Beeson*, 28 F.Supp.2d at 892.

Specifically, there is no reason to believe, nor is there any evidence that Congress actually believed, that excessive force claims are more meritorious than any other category of prisoner litigation. *See Beeson*, 28 F.Supp.2d at 892. Creating an exception for excessive force claims would circumvent the Congressional purpose of weeding out frivolous claims before they are filed in federal court. See id.; *Navarrete v. Metro. Detention Ctr.*, No. 97cv4071, 1999 WL 294875 (E.D.N.Y. March 19, 1999). Thus, efficiency and judicial economy favor exhaustion of all prisoner claims prior to a federal lawsuit being brought.

For these reasons, and in the absence of binding precedent to the contrary, the Court finds that prisoner claims of excessive force under the Eighth Amendment are claims "with respect to prison conditions" and, thus, are subject to § 1997e(a)'s exhaustion requirement. Accordingly, because Nussle has failed to exhaust his remedies before the DOC, the complaint is dismissed.

CONCLUSION

For the reasons stated above, the defendant's Motion to Dismiss (doc. # 8] is GRANTED.

SO ORDERED this 22nd day of November, 1999 at Bridgeport, Connecticut.

/s/Alan H. Nevas
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	3:99CV01091 (AHN)
Plaintiff,	:	
	:	
v.	:	
	:	
C.O. WILLETTE, and	:	
C.O. PORTER	:	
Defendants.	:	

JUDGMENT

This matter came on before the Honorable Alan H. Nevas, Senior United States District Judge, as a result of defendant Correction Officer Porter's motion to dismiss.

This Court has reviewed all of the papers filed in conjunction with the motion and on November 22, 1999 entered a Ruling on Motion to Dismiss granting the motion and dismissing the plaintiff's complaint for failure to exhaust his remedies before the Department of Corrections.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants and the case is closed.

Dated at Bridgeport, Connecticut, this 23rd day of November, 1999.

KEVIN F. ROWE, Clerk

By:_____
/s/ Deputy-in-Charge

Entered on Docket 11/29/99

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD NUSSLE,	:	CIVIL ACTION NO.:
Plaintiff,	:	3:99CV01091 (AHN)
	:	
v.	:	
	:	
C.O. WILLETTE, and	:	
C.O. PORTER,	:	
Defendants.	:	DECEMBER 1, 1999

PLAINTIFF'S NOTICE OF APPEAL

The plaintiff hereby provides notice of his intent to appeal the District Court's Motion to Dismiss filed on November 22, 1999.

THE PLAINTIFF

BY:_____
/S/ Norman A. Pattis
Federal Bar No. ct13120
51 Elm Street, Suite 409
New Haven, CT 06510
(203) 562-9931
Plaintiff's Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: May 3, 2000 Decided: August 24, 2000)

Docket No. 99-0387

RONALD NUSSLE,

Plaintiff-Appellant,

-v.-

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,

Defendants-Appellees.

Before: CALABRESI, PARKER, and STRAUB, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*) granting the defendant's motion to dismiss the plaintiff's § 1983 complaint for failure to exhaust administrative remedies. The District Court held that the Prison Litigation Reform Act of 1995 ("PLRA") required the plaintiff to exhaust administrative remedies before bringing his § 1983 claim to court. We reverse the District Court's judgment, holding that the PLRA exhaustion requirement does not encompass claims for assault or excessive use of physical force under the Eighth Amendment.

Vacated and remanded.

NORMAN A. PATTIS, Williams and Pattis, LLC, New Haven, CT, *for Plaintiff-Appellant*.

GREGORY T. D'AURIA, Assistant Attorney General, State of Connecticut (Richard Blumenthal, Attorney General, and Robert B. Fiske, III, Assistant Attorney General, on the brief), for Defendants-Appellees.

STRAUB, *Circuit Judge*:

Appellant Ronald Nussle appeals from a judgment of the United States District Court for the District of Connecticut (Alan H. Nevas, *Judge*), dismissing his complaint for failure to exhaust administrative remedies. Nussle's appeal presents an issue of first impression in this Circuit: whether the exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), encompasses claims for excessive use of physical force under the Eighth Amendment. Because we conclude that § 1997e(a) does not apply to allegations of particular instances of excessive

force or assault by prison employees, we vacate the District Court's judgment and remand for reinstatement of Nussle's complaint.

BACKGROUND

This action arises from Nussle's claim that he was wrongfully assaulted by corrections officers acting under color of law at the Cheshire Correctional Institute ("CCI") in Cheshire, Connecticut. Nussle has been an inmate at CCI, under custody of the Connecticut Department of Corrections ("DOC"), since May 1996. He alleges that from the time of his arrival at CCI, he was the target of a prolonged and sustained pattern of harassment and intimidation by corrections officers on account of his perceived friendship with the Governor of the State of Connecticut. Nussle complains of injuries arising from one particular violent incident during that period. According to Nussle, on or about June 15, 1996, defendants Willette [1] and Porter entered his cell, instructed him to leave the cell, and proceeded to beat him without apparent provocation or justification of any sort. The officers allegedly "placed [Nussle] against a wall and struck him with their hands, kneed him in the back, [and] pulled his hair. The plaintiff was beaten so badly he lost control of his bowels." Nussle claims that these actions were motivated by a sadistic intent to cause physical pain, and that the officers threatened to kill him if he reported the beating. As a result of the incident, Nussle asserts that he suffered bruises, lacerations, physical pain (including ongoing numbness in his right leg), and emotional distress.

On June 10, 1999, Nussle commenced this action against corrections officers Willette and Porter in their individual capacities. His claim under 42 U.S.C. § 1983 alleges that the officers violated his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment and his Fourteenth Amendment right to substantive due process. [2] Nussle also asserted pendent state law claims for assault and battery. In order to remedy his injuries, Nussle's complaint sought compensatory and punitive damages as

well as attorney's fees and the costs of bringing this action. The defendants moved to dismiss Nussle's complaint on the ground that he had failed to exhaust administrative remedies. The District Court agreed and granted the defendants' motion, holding that the exhaustion requirement of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) ("PLRA") (codified at 42 U.S.C. § 1997e(a) (Supp. 2000)), required Nussle first to exhaust DOC's administrative remedies before taking his § 1983 claim to court. This timely appeal followed.

DISCUSSION

We review a grant of a motion to dismiss for lack of exhaustion *de novo*, taking as true all allegations in the complaint, and drawing all reasonable inferences therefrom in favor of the nonmoving party. *See In re Merrill Lynch Ltd. Partnerships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). We must "vacate the dismissal unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief." *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 110 (2d Cir. 1998) (internal quotation marks omitted).

I. Enactment of the PLRA Exhaustion Requirement

As a general matter, exhaustion of state remedies, whether administrative or judicial, is not a prerequisite to maintaining an action under § 1983. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982); *see also Heck v. Humphrey*, 512 U.S. 477, 480 (1994); *Doe v. Pfrommer*, 148 F.3d 73, 78 (2d Cir. 1998). Statutory purpose and legislative intent support this presumptive rule of non-exhaustion. The "very purpose" of § 1983, the precursor of which first was enacted during Reconstruction as part of the Ku Klux Act of April 20, 1871, ch. 22, 17 Stat. 13, was "to interpose the federal courts between the States and the people, as guardians of the people's federal rights-to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225,

242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1880)); *see Patsy*, 457 U.S. at 503.

Nevertheless, exhaustion of state remedies may be required in those limited circumstances in which "Congress has carved out a specific exception to the general rule that exhaustion is not required." *Doe*, 148 F.3d at 78. The inmate exhaustion provision at issue in this case, 42 U.S.C. § 1997e(a), is an exception of this sort. This provision first was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Act ("CRIPA"), Pub. L. No. 96-247, 94 Stat. 349 (1980) (codified as amended at 42 U.S.C. §§ 1997, 1997a-1997j (1994 & Supp. 2000)), and was intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 actions. *Patsy*, 457 U.S. at 508 (1982) (refusing to require exhaustion for § 1983 claims not covered by the CRIPA exhaustion provision); *see also McCarthy v. Madigan*, 503 U.S. 140, 149 (1992) (declining to extend § 1997e(a)'s exhaustion provision to *Bivens* actions). The pre-PLRA version of § 1997e(a) provided a discretionary mechanism by which courts could (but were not obligated to) require prisoners to exhaust state administrative remedies before asserting claims under § 1983. 3

Section 803(d) of the PLRA added teeth to the § 1997e(a) exhaustion provision, affirmatively *requiring* prisoners to exhaust administrative remedies, whether federal or state, before bringing any federal claims "with respect to prison conditions." 4 The PLRA strengthened the § 1997e(a) exhaustion provision in three relevant respects. First, by its own terms the pre-PLRA exhaustion provision applied only to § 1983 claims, not to actions brought under other federal laws. *See, e.g.*, *McCarthy*, 503 U.S. at 150. The amended provision, by contrast, applies to any federal claim brought "with respect to prison conditions." 42 U.S.C. § 1997e(a). Second, the pre-PLRA provision was not mandatory upon courts. Rather, it simply *authorized* courts to invoke exhaustion, at their discretion, if requiring exhaustion "would be appropriate and in the interests of justice." 42 U.S.C. § 1997e(a)(1) (1994) (amended 1996). In so doing, a court was permitted only to "continue" the action for up to 180 days, not to dismiss the action outright. *See McCarthy*,

503 U.S. at 150; *Patsy*, 457 U.S. at 510-11. The PLRA, however, requires exhaustion of available administrative remedies before inmate-plaintiffs may bring their federal claims to court at all. Third, exhaustion under the pre-PLRA version of § 1997e only could be required if two conditions were met: (1) if the available administrative procedures were "plain, speedy, and effective"; and (2) if the Attorney General certified, or the court itself determined, that the prison's grievance provisions substantially complied with minimum acceptable standards set forth by the Attorney General or were "otherwise fair and effective." *See Patsy*, 457 U.S. at 510-11. The PLRA, on the other hand, does not make "effectiveness" of administrative remedies a precondition to the exhaustion requirement.

At the same time that it expanded the scope of CRIPA's exhaustion provision, the PLRA also explicitly limited its applicability only to federal actions that are brought "with respect to prison conditions"-a qualification on the scope of the exhaustion provision not found in the pre-PLRA version of § 1997e(a). Therefore, analysis of whether the amended version of § 1997e(a) applies to excessive force or assault claims must account for the manner in which the PLRA broadened the scope of this provision as well as the manner in which it simultaneously limited that scope. Both aspects of this amendment, in other words, must be presumed to have "real and substantial effect," *Stone v. INS*, 514 U.S. 386, 397 (1995), so as not to render statutory language superfluous. *See Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *3 (S.D.N.Y. Nov. 5, 1998); *see also Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

We interpret the amended version of § 1997e(a) against the background principles that govern exhaustion of administrative remedies generally, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts"); *United States v. Figueroa*, 165 F.3d 111, 115 (2d Cir. 1998), and

in light of the interpretive principle that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the [general rule]." *Commissioner v. Clark*, 489 U.S. 726, 739 (1989); *see also Patsy*, 457 U.S. at 508 (exhaustion provision in § 1997e(a) is intended to be "only a narrow exception" to the general rule of non-exhaustion in § 1983 cases); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) (narrowly interpreting statutory exception in Fair Housing Act); *Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (narrowly interpreting statutory exception in Copyright Act).

I. Applicability of § 1997e to Excessive Force or Assault Claims

Whether or not assault or excessive force claims are subject to the amended version of the § 1997e(a) exhaustion requirement turns entirely on whether such claims fall within the category of actions "brought with respect to prison conditions" covered by that provision. If particular incidents of assault or the use of excessive force do not constitute "prison conditions" within the meaning of the statutory text, then Nussle's § 1983 claim should not be subject to the exhaustion requirement. Conversely, if claims for particular instances of assault or excessive force *are* properly considered claims "brought with respect to prison conditions," then Nussle must fulfill § 1997e(a)'s requirement that he exhaust "such administrative remedies as are available" 5 before taking his federal claims to court. 42 U.S.C. § 1997e(a). The issue is one of first impression in this Circuit. *See Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (declining to resolve the "complex legal issue[]" of whether § 1997e(a)'s exhaustion requirement encompasses particular claims for excessive force).

Courts have divided over whether excessive force and assault claims are encompassed within this provision. *See id.* (noting split in authority). A number of courts that have analyzed the issue, including the Third and Sixth Circuits, have concluded that § 1997e(a) does encompass such claims. 6 *See Booth v. Churner*, 206 F.3d 289, 293-98 (3d Cir. 2000) (excessive force claims are actions "brought with

respect to prison conditions" under § 1997e(a)), *petition for cert. filed*, No. 99-1964 (June 5, 2000); *Freeman v. Francis*, 196 F.3d 641, 643-44 (6th Cir. 1999); *Cuoco v. United States Bureau of Prisons*, No. 98 Civ. 9009, 2000 WL 347155, at *3-*6 (S.D.N.Y. Mar. 31, 2000); *Castillo v. Buday*, 85 F. Supp. 2d 309, 312 (S.D.N.Y. 2000); *Beeson v. Fishkill Correctional Facility*, 28 F. Supp. 2d 884, 888-92 (S.D.N.Y. 1998). However, a number of courts have held to the contrary. *See Tolliver v. Wilson*, No. 99 Civ. 9555, 2000 WL 1154311, at *4 (S.D.N.Y. Aug. 14, 2000) ("prison conditions" does not encompass particular incidents of assault or use of excessive force); *Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *11-*12 (S.D.N.Y. Mar. 30, 2000); *Wright v. Dee*, 54 F. Supp. 2d 199, 205-06 (S.D.N.Y. 1999); *Carter v. Kiernan*, No. 98 Civ. 2664, 1999 WL 14014, at *2-*5 (S.D.N.Y. Jan. 14, 1999); *Baskerville v. Goord*, No. 97 Civ. 6413, 1998 WL 778396, at *2-*5 (S.D.N.Y. Nov. 5, 1998); *Royster v. United States*, No. 98 Civ. 4109, 1999 WL 1567734, *3 (S.D.N.Y. Nov. 23, 1999); *see also Peddle v. Sawyer*, 64 F. Supp. 2d 12, 15-16 (D. Conn. 1999) ("prison conditions" does not encompass sexual assault). In light of the text, structure, and legislative history of the PLRA, we agree with those courts that have held that § 1997e(a) does not encompass particular instances of excessive force or assault.

A. *Statutory Text of § 1997e(a)*

In considering the proper scope of §1997e(a), we begin by examining the text of the statute itself, since the language of a statutory provision, if clear and unambiguous on its face, is presumed to bear its plain meaning unless the text suggests an absurd result. *See Devine v. United States*, 202 F.3d 547, 551 (2d Cir. 2000) ("In the usual case, if the words of a statute are unambiguous, judicial inquiry should end, and the law is interpreted according to the plain meaning of its words."). When considering plain meaning, we nevertheless must also keep in mind context and the structure of the statute as a whole. *See, e.g., Miller v. French*, 120 S. Ct. 2246, 2248-49 (2000); *see also Bailey v. United States*, 516 U.S. 137, 145 (1995) ("The meaning of statutory language, plain or not, depends on context." (internal quotation marks and citation omitted)); *K Mart*

Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (assessment of plain meaning must also look to "language and design of the statute as a whole").

The use in § 1997e(a) of the term "prison conditions," however, is scarcely free of ambiguity. Section 1997e(a) itself provides no definition of what constitutes a claim "brought with respect to prison conditions"-and neither does § 1997e(h), the definitional provision of § 1997e, or § 1997, which also defines terms used in § 1997e. The plain meaning of "prison conditions" in § 1997e(a) does not obviously encompass particular instances of excessive force or assault, as the defendants argue here-indeed, it actually suggests the opposite. In the context of this statute, the term "conditions," used in its plural form, denotes "attendant circumstances" or an "existing state of affairs"-as exemplified by such ordinary phrases as "living conditions," "playing conditions," and "adverse weather conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961); *see also Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting). In light of this definition of "conditions," the use of the term "prison conditions" in § 1997e(a) would appear to refer to "circumstances affecting everyone in the area affected by them," rather than "single or momentary matter[s]," such as beatings or assaults, that are directed at particular individuals. 7 *Booth*, 206 F.3d at 300-01 (Noonan, J., concurring and dissenting); *see also Carter*, 1999 WL 14014, at *3 ("The ordinary, contemporary, common meaning of the phrase 'prison conditions' refers to such things as medical treatment, food, clothing, and the nature and circumstances of the housing available in prison.").

B. *Relationship between 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g)(2)*

While § 1997e(a) does not expressly define the term "prison conditions," similar language is used and explicitly defined in a different section of the PLRA, 18 U.S.C. § 3626(g)(2). 8 This definition, by its own terms, only applies to "this section"-*i.e.*, 18 U.S.C. § 3626. Nevertheless, the defendants urge that § 1997e(a) should be read *in pari*

materia with 18 U.S.C. § 3626, based on the interpretive canon that language "used in one portion of a statute . . . should be deemed to have the same meaning as the same language used elsewhere in the statute." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 45 (2d Cir. 1988) ("Construing identical language in a single statute *in pari materia* is both traditional and logical."). Other courts have read the "prison conditions" language of § 1997e(a) *in pari materia* with the definition provided in 18 U.S.C. § 3626(g)(2). *See, e.g. Booth*, 206 F.3d at 294; *Freeman*, 196 F.3d at 643-44; *Beeson*, 28 F. Supp. 2d at 888; *Giannattasio*, 2000 WL 335242, at *11-*12. *But see Carter*, 1999 WL 14014, at *3-*4 (declining to rely upon the § 3626(g)(2) definition to interpret meaning of "prison conditions" under § 1997e(a)). The text of § 3626(g)(2), however, is no less ambiguous than the text of § 1997e(a) itself-indeed, judges have reached opposite conclusions on whether § 1997e(a) encompasses excessive force and assault claims notwithstanding their common reliance on 18 U.S.C. § 3626(g)(2) for guidance. *Compare, e.g., Booth v. Churner*, 206 F.3d at 294-95 (opinion of the court) (excessive force claims are encompassed within the § 3626(g)(2) definition); *and Beeson*, 28 F. Supp. 2d at 888-89 (same), *with Booth*, 206 F.3d at 301-02 (Noonan, J., concurring and dissenting) (excessive force claims do not fall within the definition in 18 U.S.C. § 3626(g)(2) and are therefore outside the scope of § 1997e(a)); *Baskerville*, 1998 WL 778396, at *4-*5 (same).

Section 3626(g)(2) encompasses two categories of civil actions: (1) those brought with respect to "conditions of confinement," and (2) those brought with respect to "the effects of actions by government officials on the lives of persons confined in prison." 18 U.S.C. § 3626(g)(2) (Supp. 2000). Section 3626(g)(2)'s reference to "conditions of confinement" is "no more apt" to include particular instances of assault or excessive force than the reference to "prison conditions" in § 1997e(a) itself. *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting). To characterize particular instances of assault or the use of excessive force as "conditions of confinement" clearly

departs from normal, everyday use of the phrase, as the Third Circuit concedes and other courts apparently do not urge. *See id.* at 294, 296 n.5 (opinion of the court) (excessive force claims "do not naturally fall into" category of actions "with respect to conditions of confinement"); *id.* at 301 (Noonan, J., concurring and dissenting) (statutory phrase "'conditions of confinement' does not encompass specific batteries").

Instead, those courts requiring exhaustion have, without exception, placed excessive force and assault claims within the second category set forth in § 3626(g)(2), "effects of actions by government officials on the lives of persons confined in prison." *See, e.g., id.* at 294-95 (opinion of the court); *Beeson*, 28 F. Supp. 2d at 888-89 (quoting and following *Moore v. Smith*, 18 F. Supp. 2d 1360, 1363 (N.D. Ga. 1998)). In so doing, however, these courts have simply assumed it to be self-evident that such claims fall within the scope of § 3626(g)(2)'s second category-with a typical example being the Third Circuit's broad reading of that phrase to include almost all actions by government officials that "affect the lives of prisoners similarly . . . [by making] their lives worse." *Booth*, 206 F.3d at 295; *see also Beeson*, 28 F. Supp. 2d at 888-89 (concluding, without analysis, that excessive force claims are included within the ambit of § 3626(g)(2)).

We disagree with the notion that particular instances of assault or excessive force self-evidently constitute "effects of actions by government officials on the lives of persons confined in prison" under the second category of § 3626(g)(2), since such awkward language would not, ordinarily, be used to describe such incidents. In his dissent from the Third Circuit's decision in *Booth v. Churner*, Judge Noonan, sitting by designation, vividly argues this point:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such a circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken

> or mouths are mauled, no one on earth, educated or uneducated, would use such roundabout phraseology to express the blow.

Booth, 206 F.3d at 302 (Noonan, J., concurring and dissenting); *see Giannattasio*, 2000 WL 335242, at *12 (holding that the use of excessive force does not constitute a "prison condition" in the ordinary sense of the term). The use of "roundabout phraseology," of course, does not necessarily end the inquiry, for Congress certainly "has a right to define one thing to mean something different from what it normally means." *Benjamin v. Jacobson*, 172 F.3d 144, 173 (2d Cir.) (en banc) (Calabresi, J., concurring), *cert. denied*, 120 S. Ct. 72 (1999). Still, the "elephantine way" in which Congress drafted § 3626(g)(2), *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), does signal the need for closer inquiry-for it is hardly certain that the text of the statute includes claims of excessive force or assault, at least not without further explanation. 9 *Cf. Benjamin*, 172 F.3d at 192 n.35 (Calabresi, J., concurring) ("[I]f [a legislature] seems to say that a banana *is* an apple, we should not hesitate to try to figure out what it really meant to say.").

C. *Structure, Purpose, and Legislative History of the PLRA*

Since the text of both 42 U.S.C. § 1997e(a) and 18 U.S.C. § 3626(g) are ambiguous, we turn to the structure and purpose of the statute as a whole, the legislative history of the PLRA, and the broader legal context for interpretive guidance concerning the meaning of "prison conditions" and the relationship between § 1997e(a) and § 3626(g)(2). *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991); *Crandon v. United States*, 494 U.S. 152, 158 (1990) (in addition to statutory language, courts must also look to the "design of the statute as a whole and to its object and policy" to determine the statute's meaning).

Sections 3626(g)(2) and 1997e(a), enacted by §§ 802 and 803 of the PLRA, respectively, advance distinct statutory purposes. While 42 U.S.C. § 1997e(a) is concerned with filtering out frivolous suits administratively, before they get

to court, 18 U.S.C. § 3626-codified in an entirely different title of the U.S. Code-is concerned with the different purpose of preventing "courts from micromanaging prison systems . . . [and] usurping the authority given to prison administrators to decide matters of routine prison administration." *Baskerville*, 1998 WL 778396, at *4 (internal quotation marks, citations, and footnote omitted); *see also Benjamin*, 172 F.3d at 182 (Calabresi, J., concurring) (noting that by enacting § 3626, "Congress meant to get the federal courts out of the business of running jails").

In this light, the term "government officials" in § 3626(g)(2) is most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive physical force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority. *See Giannattasio v. Artuz*, No. 97 Civ. 7606, 2000 WL 335242, at *12 (concluding that the second category in § 3626(g)(2) refers to "acts of supervisory officials, such as the imposition of general rules and policies, that influence how a prison is run . . . [and not] day-to-day interactions between prisoners and corrections officers"); *Baskerville*, 1998 WL 778396, at *4 (interpreting § 3626(g)(2) in light of that section's purpose to conclude that the definition "contemplates actions by prison officials that have broad effects on prison administration"). A similar use of the term "official" in a different part of the same section supports this conclusion. Section 3626(a)(3)(F), concerned with the prerequisites for the issuance of prisoner release orders, confers standing to oppose such release orders upon "[a]ny State or local official" whose "jurisdiction or function includes" the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. *See, e.g.*, *Ruiz v. Estelle*, 161 F.3d 814, 819-21 (5th Cir. 1998) (discussing and interpreting § 3626(a)(3)(F)), *cert. denied*, 526 U.S. 1158 (1999). As in § 3626(g)(2), this usage of the word "official" quite clearly

refers to those officials with administrative or policymaking responsibility.

An examination of cases in which § 3626 directly has been applied also reinforces this conclusion: the types of "government officials" who were defendants or parties to consent decrees in the institutional reform actions brought prior to the enactment of the PLRA routinely were senior policymaking or administrative officials. *See, e.g.*, *Miller v. French*, 120 S. Ct. 2246, 2250-51 (2000) (inmate class action initially brought against Indiana prison officials, including superintendent of correctional facility); *Ruiz v. Johnson*, 178 F.3d 385, 387 (5th Cir. 1999) (inmate class action initially brought against Texas prison officials, including director of Texas Department of Criminal Justice and members of Texas Board of Criminal Justice), *abrogated by French*, 120 S.Ct. 2246; *Benjamin*, 172 F.3d at 149-50 (seven class actions by pretrial detainees initially brought against New York City prison officials, including commissioner of corrections), *cert. denied*, 120 S.Ct. 72 (1999); *Hadix v. Johnson*, 133 F.3d 940, 941 (6th Cir.) (inmate class action initially brought against "various state prison officials" in Michigan), *cert. denied*, 524 U.S. 952 (1998); *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 652 (1st Cir. 1997) (class action by pretrial detainees initially brought against Massachusetts prison officials, including Suffolk County sheriff and Massachusetts corrections commissioner), *cert. denied*, 524 U.S. 951 (1998); *Gavin v. Branstad*, 122 F.3d 1081, 1083 (8th Cir. 1997) (inmate class action initially brought against "a number of Iowa state officials"), *cert. denied*, 524 U.S. 955 (1998). Moreover, many of the institutional reform actions to which 18 U.S.C. § 3626 is addressed initially were brought as class actions. *See, e.g.*, *Benjamin*, 172 F.3d at 149-50. By their nature, such aggregated claims target the actions of senior officials, and, indeed, the "prospective relief" that subsequently resulted typically took the form of consent decrees between plaintiffs and elected or appointed state officials or injunctions mandating action at the policymaking levels of the state or local government, not lower level government employees. *See, e.g.*, *id.* (discussing consent decrees that were entered in actions

brought by classes of pretrial detainees in mid-1970s). *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 12-22 (1997) (discussing the kinds of litigation in the 1970s and 1980s that catalyzed the political and judicial responses that ultimately resulted in the enactment of the PLRA).

We therefore decline the defendants' invitation to blindly import the 18 U.S.C. § 3626(g)(2) definition of "civil actions brought with respect to prison conditions" into 42 U.S.C. § 1997e(a) without regard to context and the distinct statutory purposes that these two provisions advance. *See Carter*, 1999 WL 14014, at *3-4; *Baskerville*, 1998 WL 778396, at *4. *Cf. French*, 120 S.Ct. at 2259 (automatic stay provision of § 3626(e)(2) "must be read not in isolation, but in the context of § 3626 as a whole"). And even to the extent that we may rely upon § 3626(g)(2), it stretches that provision's definition too far to characterize lower level government employees, such as corrections officers, as "government officials," since such a reading of the term "officials" would include just about any government employee without regard to level of responsibility or authority. *See Giannattasio*, 2000 WL 335242, at *12.

An examination of the legislative history of the PLRA suggests the same result. The PLRA's sponsors broadly categorized the bill's provisions as being divided into two major sets of provisions: (1) those aimed at deterring frivolous suits by inmates by raising the cost to prisoners of engaging in "inmate litigation fun-and-games" (garnishment procedure in amendment to *in forma pauperis* provisions; exhaustion provisions; revocation of good-time credits for frivolous suits; prohibition against suing for mental or emotional injury absent showing of physical injury); and (2) those that establish "some tough new guidelines for Federal courts when evaluating legal challenges to prison conditions . . . [in order to] restrain liberal Federal judges who see violations of constitutional rights in every prisoner complaint and who have used these complaints to micromanage State and local prison

systems." 141 CONG. REC. S14626 (daily ed. Sept. 29, 1995) (statement of Sen. Dole, Majority Leader of the Senate). 10 With respect to the first category, floor statements overwhelmingly suggest that the concern over "frivolous" suits in this context refers to subject matter, rather than to the factual merits of a claim that, if proven, would be meritorious. *See, e.g.*, 141 CONG. REC. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch, Chair of Senate Judiciary Committee) (PLRA is designed to "help restore balance to prison conditions litigation and . . . ensure that Federal court orders are limited to remedying *actual violations of prisoners' rights*") (emphasis added); 141 CONG. REC. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Abraham) (providing examples of "frivolous" cases to be prevented as "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety").

As revealed by this examination of statutory purpose and context, it is clear that particular instances of assault or excessive force were never meant to be included within the ambit of § 3626(g)(2) at all. In context, it makes little sense to apply the definition in § 3626(g)(2) to particular cases of assault or excessive force that do not contemplate ongoing judicial supervision or some other form of "prospective relief" affecting large numbers of inmates-let alone individual claims that complain of past, wholly completed conduct-since § 3626 does not even cover claims for compensatory money damages. *See* 18 U.S.C. § 3626(g)(7) ("the term 'prospective relief' means all relief other than compensatory monetary damages"). In addition to the rather "inept" use of language that would result from the defendants' interpretation, *Booth*, 206 F.3d at 302 (Noonan, J., concurring and dissenting), including particular claims of this sort would do nothing to advance the purpose of the section.

Consideration of the background Eighth Amendment principles against which Congress enacted the PLRA also supports this conclusion. Pre-PLRA Supreme Court

decisions disaggregate the broad category of Eighth Amendment claims so as to distinguish between "excessive force" claims, on the one hand, and "conditions of confinement" claims, on the other. In *Hudson v. McMillian*, for example, the Supreme Court reiterated that because "contemporary standards of decency always are violated" by the malicious and sadistic use of force against prisoners, a less rigorous showing of injury was required for such claims than for conditions of confinement claims, for which "only those deprivations denying the minimal civilized measure of life's necessities" give rise to claims under the Eighth Amendment. 503 U.S. 1, 9 (1992) (internal quotation marks omitted); *see also id.* at 11 ("To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." (internal quotation marks omitted)); *see also Farmer v. Brennan*, 511 U.S. 825, 835-36 (1994) (distinguishing "excessive force" and "conditions of confinement" claims as being subject to different *mens rea* requirements).

The principles underlying this distinction are equally applicable here. While § 1997e(a) filters through administrative grievance procedures "prison conditions" claims that may be frivolous as to subject matter, the text, structure, purpose, and legislative history of the PLRA provide ample justification for not treating excessive force or assault claims in the same manner. Especially in light of our obligation to construe statutory exceptions narrowly, in order to give full effect to the general rule of non-exhaustion in § 1983 cases, *see City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995); *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982), we distinguish between "excessive force" and "prison conditions" claims for purposes of exhaustion under § 1997e(a) and conclude that exhaustion of administrative remedies is not required for claims of assault or excessive force brought under § 1983.

CONCLUSION

We hold that Nussle was not required to exhaust DOC's administrative grievance procedures before bringing this action for excessive force and assault. We therefore REVERSE the District Court's judgment and REMAND for reinstatement of Nussle's complaint.

---- Begin EndNotes ----

1 The Attorney General claims that there is not, in fact, any correction officer at CCI named "Willette." Nussle has not, however, withdrawn the action as to this officer.

2 The District Court dismissed Nussle's substantive due process claim as redundant, and Nussle does not advance this claim on appeal.

3 Before the PLRA went into effect, the exhaustion provision of § 1997e(a) read as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section or are otherwise fair and effective.

42 U.S.C. § 1997e(a) (1994) (amended 1996).

4 The amended version of § 1997e(a) reads as follows:

§ 1997e. Suits by prisoners

(a) Applicability of administrative remedies

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a) (Supp. 2000) (as amended by PLRA § 803).

5 Since we conclude that Nussle is not obligated to exhaust administrative remedies based on the subject matter of his complaint, we need not address his additional contention that since the DOC administrative grievance procedures make no provision for the award of monetary relief, he is not subject to the exhaustion requirement because there is no administrative remedy "available" to him. We note, however, that other circuits have divided over this issue. *Compare Nyhuis v. Reno*, 204 F.3d 65 (3d Cir. 2000) (exhaustion required); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (same), *petition for cert. filed*, No. 99-1918 (May 30, 2000); *Wyatt v. Leonard*, 193 F.3d 876 (6th Cir. 1999) (same); *and Alexander v. Hawk*, 159 F.3d 1321 (11th Cir. 1998) (same), *with Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999) (exhaustion not required), *cert. denied*, 120 S. Ct. 787 (2000); *Whitley v. Hunt*, 158 F.3d 882 (5th Cir. 1998) (same); *and Garrett v. Hawk*, 127 F.3d 1263 (10th Cir. 1997) (same). *Cf. Perez v. Wisconsin Dep't of Corrections*, 182 F.3d 532, 538 (7th Cir. 1999) (Easterbrook, J.) ("It is possible to imagine cases in which the harm is done and no further administrative action could supply any 'remedy.'").

6 In addition, the Fifth and Tenth Circuits have required exhaustion in cases involving excessive force, but without explicitly considering whether such claims properly fall within the § 1997e(a) requirement. *See Wendell v. Asher*, 162 F.3d 887, 890-91 (5th Cir. 1998); *Garrett v. Hawk*, 127 F.3d 1263, 1264-66 (10th Cir. 1997).

7 As Judge Noonan observes, the only other variant to this definition of "conditions" that is relevant to the term's usage in this statute-"something needing remedy" (as used in the sentence, "Trains were late to New York because of conditions in New Jersey")-suggests the same connotation. WEBSTER'S THIRD INTERNATIONAL DICTIONARY, *supra*, at 473; *Booth*, 206 F.3d at 301 (Noonan, J., concurring and dissenting).

8 Title 18, section 3626(g)(2) of the United States Code provides:

> (g) Definitions.-As used in this section-
>
> . . .
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (Supp. 1999) (as amended by PLRA § 802).

9 It should be noted that § 3626(g)(2) explicitly excludes "habeas corpus proceedings challenging the fact or duration of confinement in prison" from its reach. 18 U.S.C. § 3626(g)(2). Superficially, this exclusion might suggest that Congress meant to divide the universe of civil actions brought by prisoners into two broad categories-(1) habeas corpus actions challenging the very fact or duration of imprisonment, which are excluded from § 3626; and (2) actions that do not challenge imprisonment as such, but some particular aspect of imprisonment-and meant to include this second category in its entirety. *Cf. McCarthy v. Bronson*, 500 U.S. 136, 139-40 (1991) (relying on similar categorization of prisoners' actions to interpret 28 U.S.C. § 636(b)(1)(B), which authorizes nonconsensual referral of petitions brought by

prisoners to magistrate judges); *Booth*, 206 F.3d at 295 (discussing *McCarthy*).

However, the fact that habeas actions have been excluded from § 3626(g)(2) does not mean that all other claims that might be brought by prisoners are necessarily included by negative implication. Since it is hardly obvious that excessive force and assault claims fall within either of § 3626(g)(2)'s two categories, it remains necessary for us to interpret the breadth of these categories to determine whether such claims fall within the definition of "actions brought with respect to prison conditions"-and indeed, to determine whether § 3626(g)(2) should be relied upon to interpret § 1997e(a) at all.

10 Senator Dole was an original co-sponsor of the PLRA. *See* 141 CONG. REC. S7524 (daily ed. May 25, 1995) (statement of Sen. Dole).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 24th day of August, two thousand.

Before: Hon. Guido Calabresi,
Hon. Fred I. Parker,
Hon. Chester J. Straub,
Circuit Judges.

Docket No. 99-0387

RONALD NUSSLE,
Plaintiff-Appellant,

v.

WILLETTE, CORRECTION OFFICER, and PORTER, CORRECTION OFFICER,
Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued by counsel.

On consideration whereof, it is now hereby ORDERED, ADJUDGED and DECREED that the judgment of said district court be and it hereby is

VACATED and REMANDED in accordance with the opinion of the Court.

FOR THE COURT;
ROSEANN B. MACKECHNIE,
Clerk
by
/s/ Beth J. Meador
Administrative Attorney

ISSUED AS MANDATE:
Sep. 19, 2000

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 4, 2001

Mr. Richard Blumenthal
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

RE: Correction Officer Porter, et al,
v. Ronald Nussle
No. 00-853

Dear Mr. Blumenthal:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ William K. Suter, Clerk